Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. T. v Canada Employment Insurance Commission*, 2019 SST 223

Tribunal File Number: GE-18-3848

BETWEEN:

J. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: January 17, 2019

DATE OF DECISION: January 21, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant worked for X until August 28, 2018. The Appellant established a claim for regular Employment Insurance benefits (EI Benefits) on September 2, 2018. The Appellant commenced working part-time as a bartender for X on September 11, 2018. The employer (L. A. /Owner) indicated the Appellant sent a text to her daughter (K.) on September 20, 2018, and provided her two-week's notice. The Appellant testified she had no intention of ending her employment and worked the full shift for the employer on September 20, 2018. The Respondent determined they could not pay EI benefits to the Appellant starting September 16, 2018, because she voluntarily left her employment with X on September 20, 2018, without just cause. The Appellant submitted she did not resign her employment and was looking to receive EI benefits until November 5, 2018, when she had secured a full-time job. I find the Appellant did not voluntarily leave her employment with X. I further find the Appellant did not lose her employment by reason of her own misconduct.

ISSUES

[3] The Tribunal must decide the following issues:

> Did the Appellant voluntarily leave her employment? If so, did the Appellant have just cause for voluntarily leaving her employment?

ANALYSIS

[4] Subsection 30(1) of the *Employment Insurance Act* (EI Act) provides, in part, that a claimant "is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause…"

[5] There are numerous circumstances of just cause for voluntarily leaving an employment listed in section 29(c) of the *Employment Insurance Act* (EI Act). However, the Federal Court of Appeal has explained that the burden is on the claimant to show they had no reasonable alternative to leaving an employment having regard to all the circumstances (*Patel v. Attorney General of Canada*, 2010 FCA 95; *White v. Attorney General of Canada*, 2011 FCA 190).

Did the Appellant voluntarily leave her employment?

[6] I find the Appellant did not voluntarily leave her part-time employment with X for the following reasons. First: The Appellant testified she did not resign her employment and was dismissed by her employer. I realize the Respondent submitted the Appellant did not provide any evidence to support her statement that she was constructively dismissed. However, I find the Appellant's sworn testimony that she did not resign her employment to be credible since her statements were detailed, plausible, and reasonably consistent.

[7] Second: I prefer the Appellant's testimony over the employer's statements provided by L. A. in the Appeal Docket. I realize L. A. told the Respondent that the Appellant sent a text message to her daughter (K.) providing her two-week's notice and offering to stay on a part-time basis (Exhibit GD3-35). The employer (L. A.) further told the Respondent there was no need for the Appellant to continue working for two-weeks. However, L. A. confirmed in the Appeal Docket that the Appellant did offer to stay employed on a part-time basis (Exhibit GD3-35). Under the circumstances, I would not characterize this as a voluntary resignation by the Appellant especially since she had only worked for the employer part-time. Furthermore, the Appellant testified under oath she never resigned her employment and the employer dismissed her from the job when they provided a final paycheque after September 20, 2018. I realize the text message sent by the Appellant to the employer's daughter was not entirely clear. Still, I find on a balance of probabilities the Appellant never resigned her employment and instead sent a confusing text message to the employer's daughter offering to continue working for the employer.

[8] I do wish to emphasize that it was the employer's prerogative to dismiss the Appellant if they were unhappy with her performance or displeased that she asked to leave her shift early on September 20, 2018. However, the issue before me is whether the Appellant voluntarily left her employment. As cited above, I accept the Appellant's testimony that she did not resign her employment and wished to continue working for the employer. Under these circumstances, I simply cannot conclude the Appellant voluntarily left her employment.

[9] Since I have determined the Appellant did not voluntarily leave her employment, I will not address the issue of whether the Appellant had just cause for voluntarily leaving her employment. However, I do find the Appellant was dismissed by her employer. As a result, the issue should be whether the Appellant lost her employment by reason of her own misconduct under section 29 and 30 of the EI Act. On this matter, I wish to cite *Easson v. Attorney General of Canada (*A-1598-92, FCA) where Justice Marceau wrote that: "There are many instances in which, as a matter of fact or at least because of contradictory evidence, it is unclear whether unemployment is attributable to a claimant's own misconduct or because the claimant voluntarily left his or her employment. By uniting the two notions for the purpose of sanction, the Act makes it clear that the difference between the two situations will have to be taken into consideration only for the exercise of discretion in determining the sanction within the limits established by the legislation."

Did the Appellant lose her employment by reason of her own misconduct?

[10] Section 30(1) of the *Employment Insurance Act* (EI Act) provides, in part, that a claimant "is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause…"

[11] The EI Act does not define misconduct. The Federal Court of Appeal has explained the legal notion of misconduct for the purposes of this provision as acts that are willful or deliberate, where the claimant knew or ought to have known that his or her conduct was such that it would result in dismissal (*Lemire v. Attorney General of Canada*, 2010 FCA 314; *Mishibinijima v. Attorney General of Canada*, 2007 FCA 36; *Tucker v. Attorney General of Canada*, A-381-85).

[12] I find the Appellant did not lose her employment by reason of her own employment for the following reasons. First: The Appellant did complete her shift on September 20, 2018, despite her request to leave the workplace early that day. I realize the employer (L. A.) told the Respondent the Appellant requested by telephone to leave her shift early and this was not the proper way of requesting time off. Nevertheless, the Appellant did complete her entire shift on September 20, 2018. Furthermore, I cannot conclude the Appellant's action of calling the employer by telephone and requesting to leave a shift early was willful. Perhaps the Appellant would have been wiser to submit her request in writing, but there was no evidence of willfulness in the Appellant's actions.

[13] Second: The Appellant testified that since she began working for the employer she attended all her shifts. I accept the Appellant's testimony on this matter, because her statements remained detailed, plausible, and reasonably consistent. As a result, I cannot conclude the Appellant's work attendance would meet the legal test for misconduct.

[14] As previously cited, it was the employer's prerogative to dismiss the Appellant if they were unhappy about her last-minute request to leave a shift early. However, I must decide whether the Appellant lost her employment by reason of her own misconduct. As cited above, I cannot conclude the Appellant's actions were willful or deliberate and therefore her actions would not meet the legal test for misconduct.

[15] In reviewing the evidence, I do wish to emphasize that the communication between the Appellant and the employer was less than ideal. I further recognize there were confusing circumstances in this case. Still, I cannot conclude the Appellant voluntary left her employment. Instead, I find the Appellant was dismissed by the employer and cannot conclude she lost this employment by reason of her own misconduct.

CONCLUSION

[16] The appeal is allowed.

Gerry McCarthy

Member, General Division - Employment Insurance Section

HEARD ON:	January 17, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. T, Appellant